Proposed Changes in Federal Removal Jurisdiction and Procedure

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The subject of removal jurisdiction and procedure has long been one of the most difficult and confusing areas of federal practice.[1] Much of the confusion concerning removal results from the fact that the removal statutes have been amended in piece-meal fashion, and have not been integrated into one coherent scheme. Therefore, the attempt to clarify federal removal jurisdiction and procedure in the proposed revision of Title 28 of the United States Code[2] is most commendable. The most striking improvement effected by H.R. 3214 is one of form and arrangement. The present law contains one statutory provision conferring removal jurisdiction generally[3] and a number of scattered provisions conferring removal jurisdiction in certain specific cases.[4] The procedural and jurisdictional provisions are intermingled. In H.R. 3214, the general jurisdictional provision[5] is followed immediately by the provisions

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[1] LEWIS, REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS 8-17 (1923); Andrews, *Federal Removal Confusion*, 9 MISS. L. J. 188 (1936); Flory, *Federal Removal Jurisdiction*, 1 LA. L. REV. 499 and 737 (1939); Comment, *Chaos of Jurisdiction in the Federal District Courts*, 35 ILL. L. R. 566, 574 (1941).

[2] H.R. 3214, 80th Cong., 1st Sess. (1947), hereinafter cited as H.R. 3214. This bill was passed by the House of Representatives July 7, 1947, and was referred to the Senate Committee on the Judiciary July 8, 1947.

[3] 36 STAT. 1094 (1911), 28 U.S.C. §71 (1940).

[4] *E.g.*, 36 STAT. 1096 (1911), 28 U.S.C. §73 (1940); 36 STAT. 1096 (1911), 28 U.S.C. §74 (1940); 39 STAT. 532 (1916), 28 U.S.C. §76 (1940); 36 STAT. 1098 (1911), 28 U.S.C. §77 (1940).

[5] §1441. It provides in part as follows, "Actions removable generally (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

for specific cases.[6] The procedural provisions are separate.[7] The logical symmetry of H.R. 3214 should of itself obviate many of the difficulties encountered in interpreting the present amorphous code.

REMOVAL JURISDICTION

The present provisions authorizing removal of cases in which there has been a denial of civil rights,[8] cases brought by aliens against civil officers of the United States,[9] and suits against revenue officers,[10] have been substantially retained in H.R. 3214, the last mentioned provision being enlarged to include suits against *all* officers and employees of the United States.[11]

The present statute authorizing removal in suits between citizens of the same state claiming land under grants from different states[12] is omitted as obsolete. However, the present provision conferring original jurisdiction upon the district courts in such cases is retained.[13] The result would seem to be that such cases could be removed by virtue of the general removal jurisdictional provision.

The present provision authorizing removal because of prejudice or local influence[14] is eliminated in H.R. 3214. This provision, enacted shortly after the Civil War, has been construed so narrowly that it is of little significance. For a case to be removable under this section, the requirements as to jurisdictional amount and complete diversity must be met.[15] The only advantages of proceeding under this section are: a single defendant may remove,[16] the petition may be filed any time before trial, and the petition is filed in the district court rather than the state court.

The "Separable Controversy"

One change of substantial nature is the revision of the famous "separable controversy" provision:

> And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants

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[6] §§1442, 1443 and 1444.

[7] §§1446-50.

[8] 36 STAT. 1096 (1911); 28 U.S.C. §74 (1940).

[9] 36 STAT. 1098 (1911); 28 U.S.C. §77 (1940).

[10] 39 STAT. 532 (1916); 28 U.S.C. §76 (1940).

[11] H.R. 3214, §1442.

[12] 36 STAT. 1096 (1911); 28 U.S.C. §73 (1940).

[13] H.R. 3214, §1354.

[14] 36 STAT. 1094 (1911); 28 U.S.C. §71 (1940).

[15] Cochran v. Montgomery, 199 U.S. 260 (1905); Roraback v. Pennsylvania Co., 42 Fed. 420 (C.C.D. Conn. 1890); Terre Haute v. Evansville, etc. R. Co., 106 Fed. 545 (C.C.D. Ind. 1901).

[16] Cochran v. Montgomery, *supra* note 15, at 270.

> actually interested in such controversy may remove said suit to the district court of the United States for the proper district . . .[17]

This clause[18] resulted in the creation of a new procedural concept, a "controversy," which is not defined by statute. It is narrower in extent than "suit."[19] It is probably narrower than "cause of action," although many courts, in defining the concept, treat it as almost synonymous with "cause of action."[20] If a separable controversy exists within a suit, then the defendant or defendants actually interested in such controversy may remove the entire suit (not merely the controversy itself) to the federal court.[21] Thus, when a separable controversy is claimed to exist, the court is required to answer an essentially hypothetical question, namely, whether a separate action could have been brought involving this controversy alone. If the answer is in the affirmative, then the entire suit, although not otherwise removable, becomes removable by reason of the inclusion within it of the separable controversy.

The separable controversy clause permits removal in three situations in which removal would be impossible under the general removal provision:[22]

When some defendants refuse to join. If plaintiff of Ohio sues defendants *A* and *B*, both of New York, in an Ohio state court, *A* cannot remove alone; *B* must join in the petition. But if there is a separable controversy between plaintiff and defendant *A*, *A* may remove; it is not necessary that *B* join in the petition.

When some defendants are citizens of the state in which suit is brought. Plaintiff of Indiana sues defendant *A* of New York and defendant *B* of Ohio, in an Ohio state court. *A* and *B* cannot remove, because *B* is a resident of Ohio. But if there is a separable controversy between plaintiff and defendant *A*, *A* may remove.

When a defendant is a citizen of the same state as a plaintiff. Plaintiff of Indiana sues defendant *A* of New York and defendant *B* of Indiana in an Ohio state court. *A* and *B* cannot remove, because plaintiff and defendant *B* are both citizens of Indiana. But if there

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[17] 36 STAT. 1094 (1911), 28 U.S.C. §71 (1940), third sentence.

[18] The separable controversy clause first appeared in the Act of 1866 (14 STAT. 306), was substantially amended in 1875 (18 STAT. 470), and has been retained in substance ever since.

[19] This is necessarily so since the controversy is embodied within the suit. Harrison v. Harrison, 5 F. 2d 1001 (N.D. Miss. 1922).

[20] Tolbert v. Jackson, 99 F. 2d 513 (C.C.A. 5th 1938), *rehearing denied*, 100 F. 2d 909; Harrison v. Harrison, 5 F. 2d 1001 (N.D. Miss. 1922); Gudger v. Western N.C.R.R., 21 Fed. 81 (C.C.W.D. N.C. 1884).

[21] Under the 1866 Statute, apparently only the separable controversy was removable. *See* Barney v. Latham, 103 U.S. 205 (1880), a leading case which construed the 1875 amendment.

[22] 36 STAT. 1094 (1911), 28 U.S.C. §71 (1940), second sentence.

is a separable controversy between plaintiff and defendant *A*, *A* may remove.[23]

A common type of case which may involve a separable controversy is the negligence action against a non-resident employer. Quite frequently a resident employee is joined as a defendant with a non-resident employer.[24] A typical example is a suit against a railroad company and its engineer. The railroad company will often attempt to remove the suit to federal court. Whether or not the company is successful in having the suit removed depends upon state law. If, according to state law, a joint action may be maintained against the master and the servant when the master is liable only on the basis of respondeat superior, such a suit is not removable under the separable controversy clause.[25] If, on the other hand, under state law, a joint action may not be maintained against master and servant, a separable controversy exists, and the suit may be removed.[26]

Thus, in *Ammond v. Pennsylvania Railroad Company*,[27] the resident engineer was joined as a defendant with the railroad, a foreign corporation, in a suit commenced in the Common Pleas Court of Stark County, Ohio. In upholding removal to the district court, the circuit court of appeals pointed out that in Ohio a joint action may not be maintained against a master and servant where the master's liability is based solely upon the principle of respondeat superior.[28] Therefore, it held that a separable controversy existed, authorizing removal.[29]

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[23] The constitutional problem presented by the application of the clause to this situation is discussed *infra* at p. 261.

[24] In Ohio, the plaintiff's motive in joining the employee may be to make it possible to cross-examine him as an adverse party under OHIO GEN. CODE ANN. §11497 (1938), as well as to prevent removal.

[25] The following cases support the view that there is but a single cause of action; Putnam Memorial Hospital v. Allen, 34 F. 2d 927 (C.C.A. 2d 1929); Evans v. Sioux City Service Co., 206 F. 841 (N.D. Iowa 1913).

[26] See note 27 *infra*.

[27] 125 F. 2d 747 (C.C.A. 6th 1942).

[28] Apparently plaintiff cannot prevent removal by the device of alleging simply that "defendants" committed the acts of negligence (thus not disclosing on the face of the petition that the only basis for liability of one defendant is respondeat superior). This form of pleading was upheld against a motion to make definite and certain in *Davis v. Montei*, 38 Ohio L. Abs. 147, 49 N.E. 2d 584 (Ohio App. 1942). However, in defendant's petition for removal, the true basis of the claimed liability may be alleged.

[29] However, if the master's liability is not based solely upon respondeat superior, but upon concurrent negligence, *e.g.* negligence in employing a careless servant, the master and the servant may be joined. If concurrent negligence is alleged, at least in good faith, a separable controversy does not exist. American Bridge Co. v. Hunt, 130 Fed. 302 (C.C.A. 6th 1904); Roberts v. Shelby Steel Tube Co., 131 Fed. 729 (C.C.A. 6th 1904). *Cf.* Wery v. Seff, 136 Ohio St. 307, 29 N.E. 2d 361 (1940); Kaiser v. Rodenbaugh, 33 Ohio Op. 196, 68 N.E. 2d 239 (1946).

In Ohio, the master-servant cases are probably the commonest class of cases which may involve a separable controversy. In view of the Ohio law relating to joinder of persons primarily and secondarily liable, there would seem to be a possibility of the existence of a separable controversy whenever a plaintiff attempts to join such persons as co-defendants.[30] Other illustrations of cases which have been held to involve separable controversies are: an action against several insurance companies collectively insuring the same property,[31] a suit by a lessor against his lessee and non-resident assignee for cancellation of the lease and for damages;[32] and action against shareholders to recover separate assessments;[33] and an action against a contractor and his non-resident surety on the contractor's bond.[34]

The Constitutional Question

An obvious constitutional problem was posed by the separable controversy provision. Congress cannot extend the judicial power of the federal courts beyond the limits of the Constitution.[35] It is well established that diversity of citizenship means *complete* diversity, *i.e.,* diversity between *all* plaintiffs and *all* defendants.[36] However, the separable controversy provision permits the removal of suits which are not wholly between citizens of different states. For example, to repeat a previous illustration,[37] if plaintiff of Indiana sues defendant *A* of New York and defendant *B* of Indiana in an

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[30] The subject of primary and secondary liability is discussed comprehensively in *Losito v. Kruse,* 136 Ohio St. 183, 24 N.E. 795 (1940).

[31] Automobile Ins. Co. v. Harrison, 7 F. Supp. 846 (S.D. N.Y. 1934); Des Moines Elevator & Grain Co. v. Underwriters Ass'n, 63 F. 2d 103 (C.C.A. 8th 1933); Kohler and Chase v. United American Lines, 46 F. 2d 178 (S.D. N.Y. 1930); Ivy River Land & Timber Co. v. American Ins. Co., 190 N.C. 801, 130 S.E. 864 (1925).

[32] Brown v. Empire Gas and Fuel Co., 26 F. 2d 100 (D.C. Kan. 1928). Many suits involving lessors and lessees are not removable. Condemnation proceedings and actions to change a crossing grade against both the lessor and lessee were held to constitute but a single cause of action and so not removable in Bellaire v. Baltimore & Ohio R.R., 146 U S. 117 (1892), and State *ex. rel.* Columbus v. Columbus & Xenia R.R., 48 Fed. 626 (C.C.S.D. Ohio 1891).

[33] Wright v. Ankeny, 217 Fed. 985 (D. Wash. 1914).

[34] Hilton v. Southern Ry., 21 F. Supp. 17 (W.D. S.C. 1937).

[35] Hodgson v. Bowerbank, 5 Cranch 303 (U.S. 1809).

[36] Strawbridge v. Curtiss, 3 Cranch 267 (U.S. 1806). It has been argued that the Supreme Court has merely held that the *statute* requires complete diversity—not that the *Constitution* requires it. Chafee, *The Federal Interpleader Act of 1936,* 45 YALE L. J. 963, 973 (1936); Comment, *The Separable Controversy, a Federal Concept,* 33 CORN L. Q. 261 (1947). However, the Constitution (ART. III, §2) and the statute (28 U.S.C. §41) contain almost identical wording.

[37] See text accompanying note 23 *supra.*

Ohio state court, *A* and *B* cannot remove under the second sentence of Section 71 as both plaintiff and defendant *B* are citizens of Indiana, and, therefore, the requisite diversity of citizenship does not exist. However, if a separable controversy exists between plaintiff and defendant *A*, *A* may remove the entire suit to the federal court. It could be argued that this results in an enlargement of removal jurisdiction beyond the limits of the Constitution.

However, it is probably correct to say that there has been tacit approval of the constitutionality of the statute. The question has been seldom mentioned. In construing the Removal Act of 1875,[38] Justice Bradley, in a concurring opinion, called for a broad construction of the Constitution and the statute, and asserted that the federal courts could have jurisdiction over a controversy that is not wholly between citizens of different states.[39] A year later, when the same statute was construed to permit removal of the entire suit if a controversy between citizens of different states is included therein, the constitutional question was ignored.[40] Since then the constitutional question has been examined by a district court[41] and a circuit court of appeals.[42] The constitutionality of the statute was upheld by both courts. The reasoning of the district court is indicated by the following quotation:

> While no decision of this constitutional question seems to have occurred in the great landmarks on the subject of jurisdiction for diversity of citizenship . . . the passing of it in silence is itself significant. . . . By enforcing the statute, the courts have all been tacitly agreeing with the Congress in its interpretation of the Constitution. The true reasoning may be this: Article 3, Section 2, ordains that the judicial power *shall extend* to controversies between citizens of different states. Article 1, Section 8, par. 18, gives Congress power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. Congress, therefore, has authority to make laws necessary and proper to extend the judicial power effectively over such controversies, even when developed in state courts. Congress is the primary judge of what is necessary and proper.[43]

The circuit court of appeals stated:

> The Congress may give, restrict, or withhold such jurisdiction as it sees fit, within the boundaries fixed by the Con-

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[38] Removal Cases, 100 U.S. 457 (1879).

[39] *Id.* at 479.

[40] Barney v. Latham, 103 U.S. 205 (1880).

[41] Hoffman v. Lynch, 23 F. 2d 518 (N.D. Ga. 1928).

[42] Texas Employers Insurance Ass'n v. Felt, 150 F. 2d 227 (C.C.A. 5th 1945).

[43] Hoffman v. Lynch, *supra*, note 41, at 522.

> stitution, but it may not grant jurisdiction beyond those boundaries unless as a necessary incident to an effectual exercise of jurisdiction over the enumerated cases and controversies . . .
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> The jurisdiction of merely local controversies that the federal district courts exercise in cases of removal on the ground of separable controversies is a different class of jurisdiction from that ordinarily defined by the Constitution and statutes of the United States. It is of a class variously called ancillary, auxiliary, dependent, incidental, or supplementary. It is an extraordinary kind of ancillary jurisdiction in that it arises from an act of Congress expressly conferring it.[44]

There would seem to be a strong probability that if the question were to come before the Supreme Court, it would uphold the constitutionality of the clause.

The "Separate Controversy"

An important limitation on the operation of the separable controversy clause has been formulated by the courts. This limitation is known as the "separate controversy" principle. A well-known case illustrating the "separate controversy" is *Tillman v. Russo Asiatic Bank.*[45] Plaintiff, an American citizen, brought an action in a state court against the defendant bank, an alien corporation, located in the city of Petrograd, Russia. He joined two causes of action: one for dishonoring plaintiff's check drawn on his account in defendant bank, and another for defendant's refusal to pay its own draft drawn to one Fajans and endorsed to the plaintiff. The circuit court of appeals held that the district court would not have had jurisdiction of the second cause of action, standing alone, because of the "assignee clause,"[46] and that jurisdiction could not be based on the existence of a separable controversy (the first cause of action being the claimed separable controversy), because the removing defendant was an alien.[47] The court could have stopped there, but, instead, chose to set forth an additional ground for the decision:

> But in addition to this fatal objection, the controversy here was not "separable." On the contrary, there were joined in the complaint two entirely disconnected causes of action having neither a common subject-matter nor any other relation except that the plaintiffs and defendants were the same and the causes of action were, and under the practice might be, united in the same declaration. While the causes of action were in every sense "separate,"

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[44] Texas Employers Insurance Ass'n v. Felt, *supra,* note 42, at 230.

[45] 51 F. 2d 1023 (C.C.A. 2d 1931), *cert. denied,* 285 U.S. 539 (1932).

[46] 36 STAT. 1091 (1911), 28 U.S.C. §41(1) (1940).

[47] The separable controvery provision applies only to "citizens of different states."—*supra* note 17.

> there was no "separable controversy" within the meaning of the statute. A "separable controversy" does not arise from a joinder of numerous unrelated causes of action in order to eliminate many trials. . . . In such a situation the entire suit should not have been removed to the United States court, as is done where a "separable controversy" exists, . . . but only the cause of action over which jurisdiction by reason of diversity of citizenship might be exercised. . . . This is because the Removal Act allows removal only of suits of which the District Courts are given original jurisdiction.
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> The second cause of action is in every fundamental sense a separate suit, and should be remanded to the State Court.[48]

It will be noted that the court held the two causes of action were "separate" because they were "entirely disconnected" and "unrelated," not simply because they were two different causes of action. The court's assertion that "the Removal Act allows removal only of suits of which the District Courts are given original jurisdiction" is an unsatisfactory reason for the decision because, as pointed out *supra*,[49] the separable controversy clause *does* permit the removal of suits in which complete diversity does not exist. The district courts would not have original jurisdiction of such suits.

There are thus three gradations of cases: (1) suits involving neither a separable nor a separate controversy, requiring complete diversity for removal;[50] (2) suits involving a *separable* controversy, removable because the parties to the separable controversy have the requisite diversity;[51] (3) suits involving a *separate* controversy, in which only the separate controversy may be removed.[52] A well-known case thus summarized the possibilities:

> If the complaint contained only one controversy, no part of the suit was removable; if there were three separate suits in a single proceeding, the action should have been divided, two removed to the federal court, and one left in the state court; if there were three controversies in one suit, as we think, the entire suit was removable. . . .[53]

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[48] Tillman v. Russo Asiatic Bank, *supra* note 45, at 1027-1028.

[49] See text accompanying note 23 *supra*.

[50] The following cases are illustrative: East Coalinga Oil Fields Corp. v. Pure Oil Co., 66 F. Supp. 716 (S.D. Cal. 1946); Russell v. Champion Fibre Co., 214 Fed. 963 (C.C.A. 4th 1914).

[51] The following cases are illustrative: State v. Neustadt, 149 F. 2d 143 (C.C.A. 10th 1945); Lynch v. Springfield Fire and Marine Ins. Co. 15 F. 2d 725 (E.D. N.Y. 1926).

[52] The following cases are illustrative: Lucania Societa Italians Dic Navigazione v. U. S. Shipping Board Emergency Fleet Corp., 15 F. 2d 569 (S.D. N.Y. 1923); Nebraska v. North West Engineering Co., 69 F. Supp. 347 (D. Neb. 1946).

[53] Texas Employers Insurance Ass'n v. Felt, *supra* note 42, at 232.

The "Separate and Independent Claim or Cause of Action"

H.R. 3214 eliminates the "separable controversy" as such, but retains suit divisibility as a basis for removal jurisdiction. Section 1441 (c) is as follows:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of actions, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.[54]

It will be noted that this section in one respect is broader than the present separable controversy provision in that it is not based solely on diversity of citizenship, but is co-extensive with removability.[55] It will thus include, for example, suits involving a federal question, and suits between a citizen of the District of Columbia and a citizen of a state.[56]

Another basic change is the substitution of "a separate and independent claim or cause of action" for "controversy wholly between citizens of different states." It is questionable whether this change is an improvement. Admittedly the "separable controversy" concept is unsatisfactory. Although the term has the appearance of simplicity, it has proved difficult of application. There is much conflict in the cases on this subject.

However, the content of a "cause of action" is by no means fixed and settled. The "uncertainties of the phrase" have been recognized by the United State Supreme Court, speaking through Mr. Justice Cardozo:

> . . . The analogy is helpful, yet it will confuse, instead of helping, if we do not insist at the beginning upon a definition of our terms or at least recognition of their shifting meanings. A "cause of action" may mean one thing for one purpose and something different for another. It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of res judicata. . . . At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty. At other times and in other

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[54] H.R. 3214, §1441 (c).

[55] With reference to the present clause a prominent authority stated, ". . . removal of the suit on the basis of a separable controversy is only a specialized form of removal on the ground of diverse citizenship." DOBIE, FEDERAL JURISDICTION AND PROCEDURE 371 (1928). This will not be true of H.R. 3214.

[56] The constitutionality of 54 STAT. 143 (1940), 28 U.S.C. §41 (c) (1940), has not been passed upon by the Supreme Court. *See* Comment, *Diversity Jurisdiction for Citizens of the District of Columbia*, 9 OHIO ST. L. J. 309 (1948).

> contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed. This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed. . . .[57]

Various definitions of the term have been proposed,[58] and a vigorous debate as to its meaning has been carried on in the legal periodicals.[59] The confusion in the use of the phrase resulted in its studious avoidance by the framers of the Federal Rules of Civil Procedure.[60] It would seem inconsistent to adopt in the Judicial Code a phrase which was deliberately avoided in the Rules. Furthermore, in addition to determining the extent of a "cause of action," the courts would have to determine when a cause of action is "separate and independent." A lengthy period of uncertainty will almost inevitably result from the adoption of Section 1441 (c). It would seem distinctly preferable to retain the separable controversy phraseology for the present. We have a large number of cases construing the clause. Although these cases cannot be harmonized, they can at least be classified.[61] From the case material in a given area, it is frequently possible to make an accurate prediction as to whether a given case is removable. To adopt Section 1441 (c) would be to throw away this substantial body of case material.

In this connection it should be noted that the House Committee Report[62] asserted that this change "will somewhat decrease the volume of Federal litigation." Whether or not the amount of federal litigation should be decreased is a question of legislative policy, but even if we assume that such a decrease is a desirable ob-

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[57] U. S. v. Memphis Cotton Oil Co., 288 U.S. 62, 67-68 (1932). See also Vasu v. Kohlers, 145 Ohio St. 321, 61 N.E. 2d 707 (1945).

[58] A discussion of various definitions can be found in: CLARK, CODE PLEADING 129-148 (2d ed. 1947); McNish, *Joinder and Splitting of Causes of Action in Nebraska*, 26 NEB. L. BULL. 42, 43-45, (1946).

[59] McCaskill, *The Elusive Cause of Action*, 4 U. OF CHI. L. REV. 281 (1937); *Actions and Causes of Actions*, 34 YALE L. J. 614 (1925); Wheaton, *The Code Cause of Action*, 22 CORN L. Q. 1 (1936); Clark, *The Cause of Action*, 82 U. PA. L. REV. 354 (1934); *Joinder and Splitting of Causes of Action*, 25 MICH. L. REV. 393 (1927); *The Code Cause of Action*, 33 YALE L. J. 817 (1924); Gavit, *A "Pragmatic Definition" of the "Cause of Action"*, 82 U. PA. L. REV. 129 (1933); *The Code Cause of Action*, 30 COL. L. REV. 802 (1930); Harris, *What is a Cause of Action?*, 16 CALIF. L. REV. 459 (1928).

[60] CLARK, CODE PLEADING 146 (2d ed. 1947).

[61] See Comment, 36 COL. L. REV. 794 (1936) for a comprehensive discussion of the scope of the separable controversy provision and a classification of the cases.

[62] H. R. REP. No. 308, 80th Cong., 1st Sess. A 134 (1947).

jective it is doubtful whether Section 1441 (c) is an acceptable method of accomplishing it.

It seems probable that certain types of cases now removable would not be removable under Section 1441 (c). Thus, the negligence action against a servant and a non-resident master may become non-removable even in Ohio.[63] It seems quite possible that the courts would hold the cause of action against the master is not "separate and independent" from that against the servant, as the liability of the master and the liability of the servant stem from the same tortious act. It is thus probable that in this respect Section 1441 (c) will reduce the amount of federal litigation.

In another respect, however, Section 1441 (c) may increase the amount of federal litigation in that it will permit removal of suits containing entirely separate and independent causes of action, which are now remanded under the *separate* controversy limitation. It would thus seem that there would be no substantial net effect on the volume of federal litigation.[64]

The objections to the present separable controversy clause, and to Section 1441 (c) of H.R. 3214, can not be overcome by minor changes in phraseology. There does not seem to be any ready-made procedural concept to substitute for "separable controversy" and "cause of action."

The remedy must go deeper than that. A policy decision must first be made as to whether divisibility of suit should be retained as a basis for removal jurisdiction. If the decision is in the negative, then the separable controversy provision should be repealed. If, on the other hand, the decision is in the affirmative, the scope of such removal jurisdiction should be explicitly formulated in the statute. The draftsman of the statute should not be constrained to the compass of a brief paragraph. The statute should contain as many words as are necessary to enable the courts to determine the question of removability with a reasonable degree of certainty. An example of the problem which should be covered explicitly by statute, is the effect that should be given to state joinder rules. There is hopeless confusion on this point. It has been said that if the state law permits joinder of defendants, this precludes the possibility of a separable controversy as to one of the defendants. Thus, in a concurring opinion, Mr. Justice Black asserted:

> It was thus broadly held that there can be no other or

[63] Ammond v. Pennsylvania R. R., *supra* note 27.

[64] During the fiscal year ending June 30, 1947, out of the 58,107 civil cases commenced in the federal district courts, only 2,721 were removed from state courts. REP. ADMINISTRATIVE OFFICE OF THE U. S. COURTS 110-111 (1947).

> separable controversy, if a plaintiff properly elects under state practice to sue defendants jointly.[65]

A similar view was expressed by Circuit Judge Hutcheson:

> It is not a theoretically separable, but an actual separate, and distinct controversy, as viewed by the courts of the state where the cause is pending, which determines its removability.[66]

On the other hand, Chief Justice Hughes stated:

> If, as to the non-resident defendant seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants, does not preclude removal.[67]

On principle, it would seem that the mere fact that defendants may be joined under state law should be irrelevant to the federal question of removability. Carried to its logical conclusion, the criterion of joinability under state practice would destroy the separable controversy concept. The very essence of that concept is that, although the presence of parties joinable under state practice may prevent removal under the general provision, removal may nevertheless be effected if a separable controversy exists.

Any statute designed to replace the separable controversy provision should be subjected to thorough discussion and criticism. It would seem desirable to postpone its consideration until after the enactment of H.R. 3214, which should be amended to retain the separable controversy phraseology.

The discretionary feature of Section 1441 (c), authorizing the district court either to retain or remand the otherwise nonremovable matters, is an improvement over the present practice. With such a provision a court will not feel compelled to remand a "separate" controversy to the state court. It might even be preferable to make it mandatory for the district court to retain the entire cause, and thereby abolish completely the "separate controversy" limitation.

There would seem to be no serious constitutional objection to either course. The courts which have insisted upon remanding separate controversies have not done so because of any supposed constitutional compulsion. If the "ancillary jurisdiction" of the federal courts extends to *separable* controversies, there would seem to be no reason why it should fall short of *separate* controversies. The ancillary jurisdiction of the federal courts should be broad enough to avoid splitting a lawsuit between a federal and a state court.[68]

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[65] Pullman Co. v. Jenkins, 305 U.S. 534, 544, (1939).

[66] Lake v. Texas News Co., 51 F. 2d 862, 863 (S.D. Tex. 1931) .

[67] Pullman Co. v. Jenkins, *supra*, note 65, at 538.

[68] For a suggestion that it might be an undue extension of the ancillary jurisdiction, *see* Note, *Proposed Revision of the "Separable Controversy" Rule*, 42 ILL. L. REV. 105 (1947).

REMOVAL PROCEDURE

Under existing statutes there are unnecessary variations in the procedure for removing different types of cases. Special procedures have been established for the removal of cases on the ground of prejudice or local influence,[69] suits against revenue and other designated federal officers,[70] and suits by aliens against federal officers.[71] Most removals, however, are governed by 28 U.S.C. 72, frequently referred to as the general removal procedural statute. Under this section, the normal steps are:

1. The removing defendant gives written notice to the adverse party;

2. The removing defendant files the petition for removal and the bond in the state court, on or before answer day as fixed by state law;

3. The state court enters an order accepting the bond and granting the removal;

4. The removing defendant files a certified copy of the state court record in the district court;

5. The removing defendant files his motion or answer in the district court within the time allowed for answer by the law of the state, or within five days after filing the transcript of the record in the district court, whichever period is longer, but in any event within twenty days after filing the transcript.[72]

The case then proceeds as if it had originally been commenced in the district court unless the district court orders repleader.[73]

Under H.R. 3214 there will be but one uniform procedure applicable to all removals with an occasional departure in criminal cases. It provides:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.
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> (b) The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later.

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[69] 36 STAT. 1094 (1911), 28 U.S.C. §71 (1940).

[70] 39 STAT. 532 (1916), 28 U.S.C. §76 (1940).

[71] 36 STAT. 1098 (1911), 28 U.S.C. §77 (1940).

[72] 28 U.S.C. §72 is modified by Rule 81(c) of the FEDERAL RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, as amended, effective March 19, 1948.

[73] Under Rule 81(c), FEDERAL RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, *id.*

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Upon the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further therein unless the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.[74]

The normal steps in the removal of a case under this section would seem to be as follows:[75]

1. The removing defendant files his petition and bond in the district court, within twenty days after the commencement of the action or service of process, whichever is later.

2. The removing defendant gives notice to all adverse parties and files a copy of the petition with the clerk of the state court.

3. The defendant files his motion or answer in the federal court.[76]

It will be noted that in H.R. 3214, the time for filing the removal petition is made uniform in all cases, and is not dependent, as at present, upon state law.

Section 1446 (e) is ambiguous. The previous discussion[77] has assumed that the filing of the petition, bond, and notice "shall effect the removal" without any further action by the state court.[78] A

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[74] H.R. 3214, §1446.

[75] The ambiguity of §1446 (e) is discussed *infra*, note 77 *et seq.* The following enumeration of steps is based upon what appears to be the most reasonable construction.

[76] The time for pleading in district court is fixed by Rule 81(c) of the FEDERAL RULES OF CIVIL PROCEDURE *supra* note 72. The rule assumes the filing of a transcript of the state court record in the district court, in accordance with the present statute. There is no definite provision in H.R. 3214 for filing such a transcript and consequently there may be difficulty in applying the rule if H.R. 3214 is enacted in its present form.

[77] See note 75 *supra.*

[78] This construction assumes that the antecedents of "which" are the filing of the petition and bond, and giving notice.

possible alternative construction is that the state court shall take some affirmative action to "effect the removal."[79] If the first construction is intended, the statement in the House Committee Report[80] that the right of removal will be determined in the district court "before the petition is granted" would seem inconsistent.[81] If, on the other hand, the latter construction is intended, the action to be taken by the state court should be clearly stated, so that there will be no doubt as to how the transfer is to be accomplished.

Likewise, the procedure in district court should be spelled out. Although the House Committee Report[82] states that the right of removal will be determined in the district court "before the petition is granted," no specific provision is made in H.R. 3214 for a hearing on the petition. Such a provision should be included. In this connection, it would seem desirable for Congress to make use of the case material on procedural problems[83] encountered under the present special removal statutes which require the petition to be filed in the district court.[84] However, if H.R. 3214 is enacted in its present form, this case material should be helpful in working out the new procedure.

The provision in H.R. 3214 that the petition for removal be filed in *federal* court, rather than in *state* court as at present, is of primary importance, and will obviate many of the difficulties encountered under the present procedure. The present requirement that the petition be filed in state court inevitably causes trouble. The state court is limited to consideration of the facts as alleged in the petition for removal, and even a correct decision by the state court may be nullified by a remand order based on evidence adduced in the federal court. The delay which may result from the present practice is strikingly illustrated in a case which began in the Court of Common Pleas of Lucas County, Ohio. The defendant filed a petition to remove, which was denied by the common pleas

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[79] This construction assumes that the antecedent of "which" is "State court."

[80] H. R. REP. No. 308, 80th Cong., 1st Sess. A 137 (1947).

[81] The statement might be justified on the theory that removal is effected by the filing of the petition, etc., but if the district court later denies the petition, the case would be remanded.

[82] H. R. REP. No. 308, note 80 *supra.*

[83] *E.g.,* (1) When jurisdiction is deemed transferred, (2) the steps in the removal procedure, (3) whether or not a motion to remand is proper to retry jurisdictional facts which were determined on the hearing of the removal petition. Illustrative cases may be found in 28 U.S.C.A. §71, notes 611 et seq.; 28 U.S.C.A. §76, notes 31 to 34.

[84] Under present law, the petition is filed in the district court in suits removable because of prejudice or local influence, suits involving revenue and other designated officers, and suits brought by aliens against civil officers of the U. S.

court. A judgment for the plaintiff was reversed by the Ohio Supreme Court, which held that the petition to remove should have been granted.[85] Pursuant to the mandate of the Ohio Supreme Court, the common pleas court granted the petition to remove. However, the district court sustained a motion to remand, holding that the decision of the Ohio Supreme Court was not res judicata. In this position the district court was upheld by the Supreme Court of the United States.[86] The futile litigation of the removal question in the Ohio courts would not have taken place if the removal petition could have been filed initially in the federal court.

This case shows what can happen under the present procedure when the state court holds that a case *is* removable and the federal court holds that it is *not* removable. What is perhaps a more serious and frequent problem results from a holding by the state court that a case is *not* removable, the federal court holding that it *is* removable. If the state court denies the petition to remove, the defendant, instead of relying upon the denial of the petition as a ground for error, as in *Kniess v. Armour*,[87] may, notwithstanding the state court action, file a certified transcript of the state court record in the federal court and ask the federal court to assume jurisdiction. If the federal court holds that the case is removable, and assumes jurisdiction, the state court will ordinarily acquiesce in the ruling of the federal court, and will proceed no further. However, in a considerable number of cases, the state court has not acquiesced in the federal court's ruling and has proceeded to exercise jurisdiction.

If the state court takes this position, the defendant may seek an injunction against the prosecution of the action in state court. However, the federal courts are sometimes reluctant to grant such an injunction.[88] If an injunction is not granted, the defendant may defend on the merits in both courts, in which event his interest will be fully protected regardless of the ultimate decision on the question of removability. Obviously, however, such double litigation may be expensive. On the other hand, the defendant may choose to ignore the further proceedings in the state court. If the remov-

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[85] Kniess v. Armour, 134 Ohio St. 432, 17 N.E. 2d 734 (1938).

[86] Armour v. Kloeb, 311 U.S. 199 (1940).

[87] See note 85 *supra*.

[88] 36 STAT. 1162 (1911), 28 U.S.C. §379 (1940) forbids injunctions by federal courts against proceedings in state courts. However, it has been said that the Removal Acts qualify this statute *pro tanto*. Toucey v. New York Life Ins. Co., 314 U.S. 118, 133 (1941). H.R. 3214, §2283, provides, "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

ability of the case is ultimately upheld by the federal courts, the further proceedings in the state court will be *coram non judice*, and void. But if the federal courts should ultimately decide against removability, and remand the case to the state court, the defendant may find himself saddled with a valid default judgment in the state court.[89] This result follows from the concept of jurisdiction which has been employed in this area. According to this concept, when the question of removability is finally and conclusively determined, that determination is applied retroactively, and any proceedings in that court which is ultimately determined *not* to have had jurisdiction are nugatory.

Filing the petition for removal in federal court will no doubt reduce the number of such conflicts between state and federal courts. Inasmuch as the state court will not have passed initially on the petition for removal, it will not have taken a position against removability, and will therefore be more likely to acquiesce in the order of the federal court granting removal. However, it will still be possible, if H.R. 3214 is enacted as it now stands, for a state court to proceed in an action after a federal court has granted a petition to remove.[90] If a state court should do so, the defendant presumably would be in the same position as under the present procedure — he would be compelled to defend the action in both courts if he wished to protect his rights completely. It is probably inadvisable to attempt to amend H.R. 3214 to cover this situation. If H.R. 3214 becomes law, the number of such conflicts may become negligible. If, however, such conflicts continue, consideration should be given to the possibility of enacting corrective legislation. Such legislation might be directed to the jurisdictional concept which,[91] it is believed, is the root of the present difficulty.

This concept is based upon the orthodox theory that an order or judgment entered by a court not having jurisdiction of the subject matter is void, and subject even to collateral attack. While the theory has the merit of simplicity, its consequences are often undesirable. An early exception to the rule was made in *McCormick v. Sullivant*,[92] the Supreme Court holding that when final judgment has been rendered in an action in a federal court, the judgment could not be attacked collaterally on the ground that there was not in fact diversity of citizenship between the parties.

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[89] *E.g.*, Metropolitan Casualty Ins. Co. v. Stevens, 312 U.S. 563 (1941); Kingsbury v. Brown, 60 Idaho 464, 92 P. 2d 1053 (1939); Yankaus v. Feltenstein, 244 U.S. 127 (1917).

[90] Although H.R. 3214, § 1446 (e) states that "the state court shall proceed no further," similar language in the present law [36 Stat. 1095 (1911), 28 U.S.C. §72 (1940)] has not prevented such conflicts.

[91] *Supra*, preceding paragraph.

[92] 10 Wheat. 192 (U.S. 1825).

Quite recently, the rule has been further qualified by the application of the principle of res judicata to questions of jurisdiction of the subject matter.[93]

Another inroad has been made on the orthodox theory from a different direction. It has often been held that a temporary injunction or restraining order entered by a court without jurisdiction is void, and a violation thereof is not punishable as a contempt. However, in the celebrated case of *United States v. United Mine Workers of America*,[94] the Supreme Court stated an important limitation on this rule:

> In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants, in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt. . . .
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> . . . We insist upon the same duty of obedience where, as here, the subject matter of the suit, as well as the parties, was properly before the court; where the elements of federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt. The District Court on November 29 affirmatively decided that the Norris-LaGuardia Act was of no force in this case and that injunctive relief was therefore authorized. Orders outstanding or issued after that date were to be obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise. Convictions for criminal contempt intervening before that time may stand. . . .[95]

Perhaps the approach in *United States v. United Mine Workers of America* may be utilized in drafting a statute to eliminate conflicting proceedings in removal cases. Such a statute might provide that even though the federal courts ultimately decide that removal was improvidently granted, and accordingly remand the case, any proceedings taken in the state court while the federal court was asserting jurisdiction, and in conflict with the federal court's asserted jurisdiction, shall be void. It is interesting to note that the Texas courts have already taken such a position. In *Bishop-Babcock Sales Co. v. Lackman*, the court of civil appeals held:

> After the suit was removed to the federal court and

[93] Significant cases in this development are: Stoll v. Gottlieb, 305 U.S. 165 (1938); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Kalb v. Feuerstein, 308 U.S. 433 (1940). See also Boskey and Braucher, *Jurisdiction and Collateral Attack*, 40 COL. L. REV. 1006 (1940); Rashid, *The Full Faith and Credit Clause: Collateral Attack of Jurisdictional Issues*, 36 GEO. L. J. 154 (1948).

[94] 330 U.S. 258 (1947).

[95] *Id.* at 293-294.

> during its pending in that court, the state court had no jurisdiction of it and the defendant was not required to file an answer in that court even to the merits of the case.[96]

A limitation was indicated in *Grote v. Price:*

> . . . if from the face of the record the case is clearly not removable, then the state court does not lose its jurisdiction while the case is pending in the federal courts.[97]

Although it is manifestly impossible to eliminate all conflicts between state and federal courts in removal cases, it is certainly desirable to reduce them so far as possible. It would seem that the foregoing approach offers some possibility of achieving this objective.

CONCLUSION

The removal chapter of H.R. 3214 will effect a much-needed clarification of this difficult subject. The orderly re-arrangement of the chapter is a substantial improvement. The provision for filing the removal petition in the federal court is particularly desirable. However, the revision of the separable controversy provision is of doubtful benefit, and could easily prove to be a serious source of confusion. The provisions for removal procedure should be clarified and made explicit. H.R. 3214 does not attempt to deal with the problem of conflicts between federal and state courts in removal cases. Such an attempt could be made the subject of separate legislation.

ADDENDUM

After this article was in page proof, H. R. 3214, with amendments, was passed by the Senate on June 12, 1948, and the Senate amendments were agreed to by the House of Representatives on June 16, 1948.

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[96] 4 S.W. 2d 109, 111 (Tex. Civ. App. 1928).

[97] 139 Tex. 472, 476, 163 S.W. 2d 1059, 1060 (1942).